



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 20, 1995

Mr. Mark C. Goulet
Walsh, Anderson, Underwood,
Schultze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR95-068

Dear Mr. Goulet:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 25288.

The Abilene Independent School District ("AISD") has received a request for eight categories of information. You assert that the information sought in categories 2, 3, 4 and 5 are excepted from required public disclosure under sections 552.101 and 552.103.¹ The categories at issue are as follows:

2. All recordings or a transcript thereof of the February 28, 1994 closed session of the [AISD] Board.
3. All notes, recordings, and documentation accumulated during this process, including all notes in Nita Keese's possession referring to [the student], either as a discipline problem or a student.
4. A copy of all notes, documents, writings and recordings in possession of the Assistant Principal
5. Any notes or documents referring to the exclusion of [the student] from the National Honor Society or a transcript of any matters concerning the nomination or the refusal to nominate [the student] to the National Honor Society, and the reason therefor.

¹We assume that the remaining information has been released to the requestor.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that the certified agenda or tape recording of the February 28, 1994, closed session of the AISD board made in compliance with the Open Meetings Act is confidential under the Open Meetings Act, Government Code, section 551.104. We agree. *See* Open Records Decision Nos. 563 (1990); 495 (1988). We note, however, that the mere fact that a document was discussed in a closed session does not make it confidential. Open Records Decision No. 605 (1992). We conclude that the certified agenda, or tape recording, of the closed session may be withheld under section 552.101 of the act in conjunction with the Open Meetings Act; no other information may be kept confidential on this basis.

Next you assert that certain attorney-client communications are excepted from disclosure by the attorney-client privilege. We assume that you intended to assert section 552.107 of the act. Section 552.107(1) excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." In Open Records Decision No. 574 (1990), this office held that this exception protects information that reveals client confidences to an attorney or that reveals the attorney's legal advice. Exhibit C to your letter contains a number of memorandums that reflect legal advice to AISD officials from its legal counsel. These documents may be withheld from disclosure under section 552.107(1).² *See also* note 3 *infra*. We further note that we address only the documents submitted with your letter as exhibit C. We are unable to address whether section 552.107 applies to documents that have not been submitted to us. No documents other than those that we have reviewed may be excepted under section 552.107. *See also id.*

Because it is not clear to us whether the foregoing discussion resolves this matter, we also address your assertion that the information responsive to categories 2-5 is protected by section 552.103. That provision excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a). For section 552.103 to apply, the information must relate to litigation to which AISD is or may be a party. Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under statutory predecessor to Administrative Procedure Act is litigation for purposes of former section 3(a)(3) exception).

²The attorney-client privilege is waived by disclosure to a third party. Thus, any document that has been released to a third party may not be withheld from disclosure under section 552.107(1). *See* Open Records Decision No. 589 (1991).

First, you state that the requestor has threatened to file a lawsuit. The mere threat of litigation, without more, however, does not demonstrate that litigation may be reasonably anticipated. Open Records Decision No. 452 (1986). Second, you assert that exhibits A and B to your letter demonstrate that litigation may be reasonably anticipated because they "threaten" litigation. We disagree. These exhibits, letters to AISD from the requestor and his attorney, merely seek information to aid the requestor in his appeal to the Commissioner of Education. You do not assert that this appeal constitutes quasi-judicial litigation. Compare Open Records Decision No. 588. Nor have you demonstrated that litigation in a judicial forum may be reasonably anticipated. Therefore, to the extent that there may be documents responsive to categories 2-5 that you have not submitted to our office and we have not addressed above, they may not be withheld from required public disclosure under section 552.103.³

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LRD/rho

Ref.: ID# 25288

Enclosures: Letter from Family Policy Compliance Office,
United States Department of Education
Submitted documents

³This ruling does not address the extent to which any records responsive to the request might be confidential under the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g. See also Gov't Code § 552.114. The AISD should do so before releasing any records to the requestor other than records which relate solely to his child. With respect to FERPA, we also note that this office has been informed by the Family Policy Compliance Office of the United States Department of Education that the requestor's right to information about his child under FERPA does not prevail over AISD's right to assert the attorney-client privilege. AISD may withhold "education records" pertaining to the requestor's child pursuant to the attorney-client privilege only if the records satisfy the criteria set out in the letter from the Family Policy's Compliance Office to this office dated December 15, 1994, a copy of which is enclosed.